No. 612

FILED
JAN 2 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

SCHLUMBERGER WELL SURVEYING CORPORATION,

Petitioner,

—against—

HALLIBURTON OIL WELL CEMENTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Petitioner.

BRADY COLE,
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INDEX

Petition: Page

Statement 1

Principal Questions Presented 2

The Decision of the Circuit Court of Appeals..... 3

Facts 5

Specification of Errors 16

Reasons for Granting the Writ..... 18

Prayer 20

Brief:

Opinions Below 21

Jurisdiction 21

Statement 21

Summary of Argument..... 21

Argument:

I. The decision of the Court of Appeals below erroneously follows the overruled case of *Mitchell* v. *Tilghman*, 19 Wall. 287; and is in conflict with the controlling decision of this Court in *Tilghman* v. *Proctor*, 102 U. S. 707..... 22

II. The decision of the Court of Appeals below is in conflict with the proper construction of the Statute (U. S. C. Title 35, Sec. 33) and the applicable decisions of this Court..... 28

III. The decision of the Court of Appeals below is in conflict with the accepted and usual course of judicial procedure as laid down by Rule 53a of the Federal Rules of Civil Procedure and the controlling decisions of this Court in *Davis* v. *Schwartz* (1895), 155 U. S. 631, 636, and *Adamson* v. *Gilliland* (1917), 242 U. S. 350, 353 32

Conclusion 41

Exhibit 47 (photoprinted herein at end of brief).

Exhibit 32 (photoprinted herein at end of brief).

CITATIONS.

Cases: Page

Adamson v. *Gilliland* (1917), 242 U. S. 350 ..... 20, 32

Corning v. *Burden*, 15 How. 251 19
Corn-Planter Patent, The, 90 U. S. 181 30

Davis v. *Schwartz* (1895), 155 U. S. 631 ..... 3, 20, 32

Eibel Process Co. v. *Minnesota & Ontario Paper Co.* (1923), 261 U. S. 45 26

Hildreth v. *Mastoras* (1921), 257 U. S. 27 ..... 26, 27, 29

Mitchell v. *Tilghman* (1874), 19 Wall. 287 .. 2, 4, 16, 18, 22, 24, 25, 26, 31

O'Reilly v. *Morse*, 15 How. 62 ..... 12, 19

Smith v. *Snow* (1935), 294 U. S. 1 27

Telephone Cases, The (1888), 126 U. S. 1 ..... 19, 26, 27, 29
Tilghman v. *Proctor* (1881), 102 U. S. 707
2, 4, 18, 19, 22, 24, 25, 26, 28, 31

Statutes:

Federal Rules of Civil Procedure:
Rule 53a 3, 4, 17, 20, 32
" 52 33

Judicial Code (28 U. S. C. Sec. 347), Section 240 (a), as amended by the Act of February 13, 1925 21

Patent Statute, U. S. C. Title 35, Section 33 (R. S. 4888)
2, 4, 19, 25, 28, 29, 31

United States Supreme Court:
Rule 38, paragraph 5 18
" " " 5b 42

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The petitioner above named prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, whose decision in this cause was filed on September 5, 1942 (R. Vol. XII, pp. 5568-5577). Petition for Rehearing was denied October 12, 1942 (R. Vol. XII, p. 5598).

STATEMENT.

This is a patent infringement suit. The District Court (Southern District of Texas, Houston Division) adjudged patent No. 1,819,923,* dated August 18, 1931 (R. Vol. V, p. 3249), and patent No. 1,913,293,* dated June 6, 1933 (R. Vol. VI, p. 3826), both owned by petitioner, valid and infringed by respondent. He

* Patent No. 1,819,923 has three process claims and one apparatus claim, all of which are in suit; only claim 1 (a process claim) of patent No. 1,913,293 is in suit.

held that each patent described and claimed a meritorious and useful invention; that each had been issued in accordance with the Statute (35 U. S. C. Sec. 33); and that the evidence was such as to "compel a finding" that respondent's practices are "substantially identical" with those covered by said patents (R. Vol. I, p. 158).

The Court of Appeals, reversing the District Court, held invalid both patents in suit. The decision of the Circuit Court of Appeals was rested on the technical ground that the two patents, as drafted, do not meet the requirements of the Patent Statute, U. S. C. Title 35, Section 33 (R. S. 4888). In this connection, it held generally that the disclosures are not sufficiently full and clear to enable any person skilled in the art to practice the inventions in a useful manner, and that the patentee failed to point out and distinctly claim a useful invention or discovery.

PRINCIPAL QUESTIONS PRESENTED.

1. Did the Court below fail to follow applicable decisions of this Court, in applying *Mitchell* v. *Tilghman,* 19 Wall. 287, which held that a patent for a process must be construed as one covering the particular apparatus and mode of applying and using the process pointed out in the specification, and in disregarding (overlooking) the later case of *Tilghman* v. *Proctor,* 102 U. S. 707, which expressly overruled the earlier case of *Mitchell* v. *Tilghman?*

2. Did the Court below misconstrue the requirements of the Patent Statute, U. S. C. Title 35, Section 33 (R. S. 4888), and fail to apply applicable decisions of this Court, in holding that neither patent points

out in the disclosure, or distinctly claims, a useful invention?

3. Did the Court below disregard Rule 53a of the Federal Rules of Civil Procedure (providing that findings of the trial court shall not be set aside unless clearly erroneous), and disregard the decisions of this Court in *Davis* v. *Schwartz* (1895), 155 U. S. 631, 636, and *Adamson* v. *Gilliland* (1917), 242 U. S. 350, 353, to the same effect?

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The Court below did not disturb the finding of the trial judge that respondent has infringed (except that as to the resistivity patent it said there was no infringement if the patent were to be construed in a way which the Court below seems to have abandoned), and, although its opinion commented on the question of novelty as to one of the patents in suit (No. 1,819,923), its decision was not rested on that ground. Its opinion is somewhat confusing, but the final grounds for holding the patents invalid were that there was no sufficient labeling of what was new, and that there was no sufficient disclosure "to enable anyone to make useful electric logs solely by their teaching and the knowledge of one skilled in the art of electricity and well drilling". In reaching such conclusions it applied principles laid down in an *overruled* decision of this Court, and with that erroneous rule as a premise it held that the patents did not comply in their disclosures with the Patent Statute. Those fundamental errors permeate the entire decision below, and in addition the Court below plainly disregarded Rule 53a of the Federal Rules of Civil

Procedure and decisions of this Court, in respect to the weight to be given the trial court's findings.

With regard to the first and second questions, the Court of Appeals obviously overlooked the decision of this Court in *Tilghman* v. *Proctor, supra.* It cited in one instance, and it adopted without reservation as to both patents, the reasoning of the overruled case of *Mitchell* v. *Tilghman* (which was not cited by either party in their briefs or referred to at the argument) and construed the two patents as covering merely the particular apparatuses and the particular modes of applying or using the processes of those patents which were set forth in the specifications, by way of illustration. It then found that the processes disclosed in those patents as so construed were not useful, within the meaning of the Statute, by comparing such disclosures with the *commercial* apparatuses and particular modes of applying such processes which had been developed during years of use by the new art and industry created by those very patents. It found that, because such "refinements of method and improvements in apparatus have been made over the simplicities of the patents in controversy" by the new art and industry which those patents created, "what Schlumberger in the disclosures of these patents gave to the public is not such as the Statute contemplates * * *".

With regard to the third question, the Court of Appeals found that the patents in suit contain "no sufficient disclosure to enable any one to make useful electrical logs solely by their teaching and the knowledge of one skilled in electricity and well drilling", and that the utility of the commercial logs results from "refinements of method and improvements in apparatus", rather than from the pioneer methods

disclosed and claimed by the patents in suit. In so doing, the Court of Appeals ignored the established rule that findings of a trial court cannot be set aside unless "clearly erroneous" and unequivocal findings of fact to the contrary, which were made by the Trial Court, with ample evidence to support them.

FACTS.

1. The inventions covered by the patents are fundamental and pioneer in character and created the new art and industry of "electrical logging"* of oil wells.

The pioneer nature of "electrical logging", as first introduced to the practical arts by the patentee, is established by the depositions of thirty-six disinterested practical men of the petroleum industry who were subpoenaed by petitioner (R. Vols. V-VI, pp. 3473-3824). These men, representing a true cross-section of those using electrical logs made by the processes in issue, established that, prior to the introduction by Schlumberger of electrical logging, no electrical method for obtaining the information given by such electrical logs had ever been known; that such electrical logging had revolutionized the practices in the industry; and that electrical logging had made the greatest difference in exploring technique since the introduction of rotary drilling (30 years earlier).

These depositions also show that in the earlier method of "mechanical coring", cores or samples of earth are withdrawn from the drill hole from time

* "Electrical logging" is a term coined by the patentee and used in the specification of patent No. 1,819,923 in suit (R. Vol. V, p. 3250, l. 36) and since adopted by the petroleum industry as descriptive of the type of chart or log first introduced commercially by the patentee and produced by the practice of the inventions here involved.

to time, during the course of drilling. These cores are examined in the laboratory to determine the nature of the formation at the particular depth at which they were recovered. One serious objection to this method is that cores are taken only at intervals and thus innumerable oil sands have been entirely missed. "Electrical logs", on the contrary, give a continuous record from top to bottom of the hole, and hence have revealed countless oil sands that would otherwise have remained undetected.

The Circuit Court of Appeals recognized that "electrical logs are now made for almost all rotary drilled wells * * * " and that "without doubt electrical logging as now done by appellant and appellee has made a great practical stride in the oil well art."

2. By the practice of the two processes involved, for the first time in this art indications are obtained of distinguishing *electrical* properties of all geological formations or strata *in situ* traversed by a rotary-drilled bore hole sunk for the exploitation of productive oil sands at depth (R. Vol. I, p. 231). The device for obtaining these indications is *immersed in water* contained in the bore hole. From these electrical indications can be deduced the identity and nature of the geological formations traversed, the depth of their top and bottom boundaries, and whether or not they are porous (sands).

Prior to the introduction of the patented methods by the patentee, no electrical method was known or used for obtaining such information. "Mechanical coring" was the most useful method theretofore known for obtaining any information concerning the geological strata traversed during the course of drilling an oil well. In "mechanical coring", physical samples or cores of earth were withdrawn from the

drill hole from time to time and examined in the laboratory to determine their nature. Such "mechanical coring" was very unsatisfactory and undependable; it was expensive and in its nature did not afford information concerning all formations traversed from top to bottom of the drill hole, because the physical "cores" or "samples" were taken only at intervals and at such depths as were selected by the operator. In taking such "cores", a large part of the material is ordinarily lost, thus rendering less certain information as to the depth at which the sample was actually recovered.

3. Patent No. 1,819,923 (sometimes referred to as the "resistivity" patent) discloses and claims an electrical process for determining the nature of the geological formations *in situ* traversed by a bore hole. The patent drawing (R. Vol. V, p. 3249) shows an electrical exploring device for practicing the method, comprising three electrodes A, M and N, which is adapted to be lowered in the water in a drill hole.* These three electrodes are fixed and maintained apart at known distances. An electric current from "any suitable source" (R. Vol. V, p. 3250, pat. p. 1, l. 50) is impressed on electrode A during the operation. The value of the current is measured by the ammeter A at the surface of the ground. The current thus applied to electrode A flows through the adjoining formation and causes a difference of electrical potential on the electrodes M and N. The value of this potential difference is indicated on the instrument P which is in circuit with the electrodes M and N. The astonishing principle and discovery which character-

* Bore holes sunk as oil wells may extend to depths of 15,000 feet, the depth in the Gulf Coast usually ranging from 6,000 to 9,000 feet.

ize and underlie this process reside not only in the fact that the system is *not short-circuited* by the highly conductive fluid contained in the drill hole and in which the three electrodes A, M and N are immersed, but also in the fact that, as stated by the patentee (Pat. spec. p. 2, l. 25, R. Vol. V, p. 3251): "The measure of potential between the electrodes M and N *in the water* is then equivalent to a measure made *inside the earth* at distances r and r′ from the electrode A." (See Ex. 47, bound herein at the end of the brief, R. Vol. VI, p. 4048).* The distances r and r′ are the known and fixed distances between the current electrode A and the potential electrodes M and N, respectively.

The formula on page 2 of the patent is a shorthand expression of the relationship between the value of the current flowing from A, the distances between electrodes A and M and N, respectively, and the difference of potential between M and N caused by the resistance of the adjacent formation to the current flow. This formula is merely an expression of Ohm's law extended to a three-dimensional conductor (the earth). Since the distances between the electrodes are known and constant, when the current emitted from electrode A is held constant (as it is in practice), the difference of potential between electrodes M and N is directly proportional to the electrical resistance of the adjacent formation, despite the fact that all three of the electrodes comprising the device are *immersed in* the same column of highly conductive *water*.

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* This Exhibit 47 has been reproduced and bound in at the end of this Petition and Brief. It is like the patent drawing with points M′ and N′ added within the earth at distances r and r′ from the current electrode A, to illustrate the quoted statement from the patent.

As to the resistivities of the formations thus measured, the patent states: "I have discovered that the specific resistivity . . . *sufficiently* characterizes the different rocks so that it is possible to deduct the nature thereof *from the figures obtained* in the electrical readings. The final results of these measurements taken along a drill hole are given in the form of a *diagram of the resistivities* of the rocks at *different* depths. This 'electrical log' shows the depth of the geological horizons, such as the top of any given formation." (Pat. p. 1, l. 25, R. Vol. V, p. 3250.) The language quoted above from the patent plainly states and shows that not only are resistivity "figures obtained" but also that a "log" necessarily showing *variations* of such resistivities is formed. In spite of this description, the Court below not only stated erroneously that values of resistivities are not obtained and are of no use, but further stated erroneously that the specification has no sufficient teaching of the use of "variations" of resistivity for purposes of comparison.

A typical commercial "electrical log" (Ex. 36) made by petitioner is reproduced at p. 4037, R. Vol. VI. A commercial log made by respondent in the same well on the same day is reproduced at p. 3945 of R. Vol. VI. The solid line curve appearing at the right-hand side of each log is the resistivity curve made in accordance with the process of patent No. 1,819,923. This curve is so calibrated that the value of the resistivities of all formations traversed are obtainable. This "log" was made by the practice of the patented methods in suit. The solid line curve at the right-hand side of the log is a resistivity curve. The curve shows resistivity values at different depths and is a "diagram" showing "variations" in such resistivities for comparison with logs of other wells.

Claim 1 of the patent defines the steps of procedure

comprising the novel method and by means of which the nature of the formations traversed by a drill hole is determined by an *electrical* method. These steps as recited include the measurement of the resistivity of the *formations encountered,* the measurement of such resistivities in a hole which contains *water,* and the repetition of such measurements at *different* depths inside the drill hole.

The method as described in the resistivity patent was literally followed by the patentee in the United States in the State of Oklahoma in 1929, in successfully making 30 logs (R. Vol. III, pp. 2242-2252). This precise method, at that time, was also in *commercial* use in France and Venezuela (R. Vol. III, p. 2251). These facts, standing unrefuted, are directly contrary to the erroneous assertions made by the Circuit Court of Appeals.

The logs of both parties give to the customer the identical information concerning the geological strata traversed by a bore hole and this is the information which is expressly described in the two patents in suit. (See Respondent's declared purpose, R. Vol. VI, p. 3883; R. Vol. VII, pp. 4057, 4058.)

The Court below criticized the utility of each of the patented methods because they are used together. This criticism is unwarranted as each method is useful standing alone. The second method gives additional useful information because it prevents any question arising as to whether or not a particular formation at depth is *porous* or *non-porous.*

4. Patent No. 1,913,293 (sometimes referred to as the "porosity" patent) discloses and claims an *electrical* process for determining whether geological formations or strata traversed by a bore hole are

porous (permeable) or non-porous (impervious). Oil and salt-water are found only in porous formations (sands).

The process is based on the patent's discovery that by causing water to filter into sands at depth in a bore hole, an electromotive force will be generated by such filtration, which electromotive force will cause a *measurable* electric current to flow in the water in the bore hole *exactly opposite* the face of the sand. (See Ex. 32 bound herein at the end of the brief; R. Vol. VI, p. 4033*.) The patentee made this brilliant *discovery*.

The patentee's method as described and claimed, is expressly limited, however, to the measurement of *differences of potential* arising in the drilling fluid from the electric current spontaneously generated by infiltration of the fluid into a sand. The patent states: "This electric current gives rise by ohmic effect to differences of potential, and the *measurement of these differences* constitutes the *basis* of the process herein described" (R. Vol. VI, p. 3827; pat. p. 1, l. 59). The patent further states: "Such a filtration gives rise to an electric current which may be observed by measuring the *differences of potential* it creates in the water contained in the drill hole, exactly at the level of the porous stratum" (R. Vol. VI, p. 3827; pat. p. 1, l. 78).

Claim 1 of the patent does *not* fail to distinctly claim the process described, as the Circuit Court of Appeals erroneously stated. On the contrary, it is expressly limited to the measuring of the "differences

* Exhibit 32 has been reproduced and bound in at the end of this Petition and Brief. It shows the flow of an electric current in the drilling fluid exactly at the level of a porous sand, this current having been generated spontaneously by the infiltration of the drilling fluid into a sand.

of potential" referred to in the excerpts quoted above from the specification.

The entire "electrical" process defined by claim 1 is basically new. However, its breadth is specifically delimited by the precise steps recited. The claim does not cover *any* process other than an "electrical" process (as contrasted, for example, with a magnetic or radio-wave process); and such "electrical" process, as claimed, is limited to the measuring of the "differences of potential" which arise in the drilling fluid from the current spontaneously generated by electrofiltration.

The claim on its face refutes the Circuit Court's unwarranted implication that *O'Reilly* v. *Morse,* 15 How. 62, may have application in the instant case. The claim is not addressed to the use of a natural phenomenon, as was the claim in the *Morse* case. On the contrary, the claim here in suit is addressed to a series of steps comprising a method, and one of these steps is limited specifically to *electrical* measurements, in the water, of *differences of potential* arising from a spontaneously generated current. This current is produced by man-made conditions and does not exist naturally.

The "differences of potential" which are thus measured are recorded by both parties, in accordance with the direction of the patent, which states: "In practice, the diagrams are obtained directly by means of an automatic continuous device, which registers the value of the potential upon a sheet of paper * * *" (R. Vol. VI, p. 3829; pat. p. 3, l. 31).* The curve at the left-hand side of the commercial log

* The commercial "electric logs" of both parties (petitioner's log, R. Vol. VI, p. 4039; respondent's log, R. Vol. VI, p. 3945) show this curve on the left-hand side of each chart. This curve is calibrated to show the value of the characteristic "differences of potential" resulting from the described process.

is the curve showing said "differences of potential". On the "electrical logs" of both parties the flat portions of the curves (appearing on the left-hand side of the logs) indicate that the formations are non-porous. Wherever the curves diverge from this flat portion, such divergence indicates that the formations are porous. The *commercial* practices of both parties are precisely in accordance with the description of the porosity patent No. 1,913,293, contrary to the erroneous statements of the Circuit Court of Appeals.

5. In practice, the curve indicating the *porous* or permeable formations traversed by the drill hole is made on the same sheet of paper and simultaneously with the making of the curve of resistivities described above. The making of the two curves simultaneously during a single survey is more convenient and economical and assures absolute accuracy as to depth indications for both curves.

The "porosity" process enables one to identify *sands* and determine the depths of their top and bottom boundaries. Oil occurs in sands and so does salt water. Oil has high electrical resistance and salt water low electrical resistance. Hence, the practice of the two processes covered by the two patents in suit enables one to identify *sands* and to determine whether they contain *oil* or *salt water*. The practice of one, simultaneously with the other, in no way modifies or affects either.

The Circuit Court of Appeals erroneously, and without the support of any testimony, stated that "Neither patent practiced by itself would have had any success." The fact is that the method of the earlier patent (the resistivity patent) was practiced

successfully "by itself", in Oklahoma, France and Venezuela, as stated above. The separate methods when practiced *simultaneously* are not modified. They are not to be condemned because appropriate apparatus was devised to permit them to be practiced simultaneously for reasons of convenience and speed.

6. Petitioner is a small independent corporation* organized in 1934 for the purpose of providing to the petroleum industry the inexpensive and revolutionary service comprising the practice of the processes in suit. In 1938, it licensed a responsible service company** to practice such processes (R. Vol. X, p. 5399). This licensee, along with petitioner, offers such service to petroleum companies in every oil field in the United States where rotary drilling is employed (R. Vol. III, pp. 2294, 2296). The service is satisfactory and the cost to the customer is of the order of twelve cents ($.12) for each foot of well surveyed against a cost of ten dollars ($10) per foot for the old and unsatisfactory method of "mechanical coring".

7. Respondent is a service company*** which devoted itself to the "cementing" of oil wells from 1924 to 1938, at which time it added to its service the accused process of "electrical logging" (R. Vol. V, pp. 3442-3444).

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* Petitioner is organized under the laws of Delaware. Its principal office is in Houston, Texas. Its crews now operate in every oil producing State from Illinois to the Gulf Coast and to the Pacific.

** The Lane-Wells Company is a well-known service company organized under the laws of Delaware and having its principal office in Los Angeles, California.

*** Respondent is a corporation of Delaware, having its principal office in Duncan, Oklahoma.

8. The infringement was initiated and sponsored by a subsidiary of the Standard Oil Company of New Jersey, the Humble Oil Company (theretofore a large customer of petitioner), to obtain for itself and other subsidiaries of the Standard Oil Company of New Jersey a preferential discount. Before taking this step, Humble Oil Company sought a preferential discount of 50% from petitioner, which was refused (R. Vol. X, pp. 5421, 5422). The Humble Oil Company, being familiar with petitioner's patents and commercial logging methods, later took out two patents (issued in 1936 and 1938, respectively, R. Vol. VII, pp. 4239, 4247) on certain alleged "improvements" on the inventions here in suit. These patents were assigned to Standard Oil Development Company (a subsidiary of Standard Oil Company of New Jersey). That Company then "licensed" (R. Vol. V, p. 3499; Vol. IV, p. 2961) the respondent under said patents, upon the condition, *inter alia*, that a preferential discount of 20% on respondent's price for electrical logging should be extended to Humble Oil Company and all other affiliated companies of the Standard Oil Company of New Jersey.* The Humble Oil Company has a 6% stock interest in the respondent corporation (R. Vol. V, p. 3456). It arranged the "licensing" plan and has assisted in the defense of this suit. Its engineers established the infringement and one of them entered the employ of the respondent to direct the commercial operations (R. Vol. IV, pp. 2967-2969).

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* This elaborate "licensing" plan was merely a device to lend color to the ostensible consideration for the preferential discount. It is to be noted that respondent did not offer any testimony to show that in its accused practices it even uses the "improvements" covered by these patents.

9. The present suit was brought by petitioner to enjoin respondent from carrying to successful fruition, with the connivance and procurement of the Humble Oil Company, their efforts to deprive petitioner of the benefit of the patents in suit, so that Humble Oil Company and other affiliated companies of the Standard Oil Company of New Jersey might be let alone to enjoy without expense the fruits of the patentee's genius and investment.

10. Petitioner, petitioner's licensee, Lane-Wells Company, and respondent are the only parties practicing "electrical logging" in the United States (R. Vol. III, p. 1772). Respondent is the only infringer of petitioner's patents. Further litigation with a resulting conflict of decision is improbable because of priorities upon essential materials and equipment which would prevent the establishment of such a service, at least for the duration of the war.

SPECIFICATION OF ERRORS.

The Court of Appeals erred

1. In applying the reasoning and construction followed in the overruled case of *Mitchell* v. *Tilghman*, 19 Wall. 287, which is in direct conflict with the applicable rules of construction for process patents laid down by this Court.

2. In holding that the claims in suit of both patents do not distinctly claim what is new and useful.

3. In holding that the disclosures of both patents are not sufficient to enable any person skilled in the art to apply the processes usefully.

4. In reversing findings of fact of the Trial Court, which were amply supported and as to many of which there was no substantial evidence to the contrary, in disregard of the provisions of Rule 53a of the Federal Rules of Civil Procedure and applicable decisions of this Court.

5. In holding that "Neither patent practiced by itself would have had any success" (R. Vol. XII, p. 5571).

6. In holding that "The older patent was a commercial failure till combined with the second, and the combination made little progress until both the processes and instruments were changed to eliminate inaccuracies in ways * * * which greatly enhanced if they did not wholly produce the commercial success (R. Vol. XII, p. 5571).

7. In holding that "The necessary substitution of alternating current for the direct current which was shown in the first patent, and the special apparatus necessary to use the same cable and instruments in the making of all the desirable curves in one quick operation, and to eliminate disturbing intrusions, were things that were slow in coming, and the results of independent research and experiment" (R. Vol. XII, p. 5576).

8. In holding that "As to both these patents we are further of opinion that no sufficient disclosure of methods is made to enable any one to make useful electrical logs solely by their teaching and the knowledge of one skilled in electricity and well drilling" (R. Vol. XII, p. 5576).

9. In holding that "The appellee and its predecessor began in 1929 an effort to make these electrical investigations about 'resistivity', but without any commercial success, at least in the United States" (R. Vol. XII, p. 5570).

10. In holding that "the definite calculation of specific resistivity * * * is not useful, and is not used" (R. Vol. XII, p. 5574, referring to the resistivity patent No. 1,819,923).

REASONS FOR GRANTING THE WRIT.

The discretionally power of this Court is invoked upon the following grounds which fall within more than one of the classes described in paragraph 5 of Rule 38 of the Rules of this Court as appropriate for certiorari.

1. The Court of Appeals in its opinion followed the erroneous reasoning and construction of process patents expressed in the case of *Mitchell* v. *Tilghman* (1874), 19 Wall. 287, in that it determined the utility of the processes solely in the light of the *commercial* suitability of the precise *apparatuses* and *particular modes of applying* and using the processes, as disclosed in the specifications of the two patents in suit, rather than the correct construction expressed in the later case of *Tilghman* v. *Proctor* (1881), 102 U. S. 707 (which expressly overruled the *Mitchell* case *involving the same process patent*).. In the *Proctor* case, it was held that a patent for a process, *irrespective* of the disclosed *apparatus* or *particular mode of applying* the process, satisfies the statute provided it merely described some apparatus and particular mode

of applying the process "by which the *process can be applied* with at least some beneficial result."

The construction of the Court of Appeals of the two patents in suit is in direct conflict with the applicable rules of construction for process patents laid down by this Court.

> *Tilghman* v. *Proctor*, 102 U. S. 707;
> *Corning* v. *Burden*, 15 How. 251, 267;
> *O'Reilly* v. *Morse*, 15 How. 62;
> *The Telephone Cases*, 126 U. S. 1, 534-536.

This error was fundamental. It permeates the entire decision below and formed the erroneous premise on which other conclusions of the Court were based.

2. As a consequence of the foregoing mistake in the law, the Court below erroneously construed the Patent Statute and ignored the applicable decisions of this Court listed above in holding that the disclosures and claims in issue of the two patents in suit do not sufficiently point out and distinctly claim useful inventions.

3. The Court of Appeals, in finding, *inter alia*, that the patents in suit contain "no sufficient disclosure of methods * * * to enable any one to make useful electrical logs solely by their teaching and the knowledge of one skilled in electricity and well-drilling", and that the commercial utility of electrical logs is dependent on "refinements of methods and improvements in apparatus * * * over the simplicities of the patents in controversy", reversed essential findings of fact which were made by the District Court and amply supported by the evidence, thus rendering a decision which is in direct conflict with the accepted and usual course of judicial procedure,

as laid down by Rule 53a of the Federal Rules of Civil Procedure and by the decisions of this Court in *Davis* v. *Schwartz* (1895), 155 U. S. 631, 636; and *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

4. There is no conflict of opinion between Circuit Courts of Appeals with respect to the patents in suit, and as explained elsewhere (p. 16), there is not likely to be until the war ends, but in view of (a) the sharp conflict in conclusions reached by the Trial Judge and by the Court of Appeals, in a case involving pioneer inventions of great social and economic benefit to the public and to the petroleum industry, and (b) the plain failure of the Court below to apply and follow applicable decisions of this Court and its total disregard of the Trial Court's findings, a review by this Court is warranted.

PRAYER.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Fifth Circuit be reversed; and that petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

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December, 1942.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW.

The District Court's opinion, with findings and conclusions (R. Vol. I, pp. 153 to 165) is reported in 41 F. Supp. at page 345.

The opinion of the Circuit Court of Appeals (R. Vol. XII, pp. 5568 to 5576) is reported in 130 F. (2d) at page 589.

JURISDICTION.

The decision of the Circuit Court of Appeals below was filed September 5, 1942 (R. Vol. XII, pp. 5568-5576). Petition for Rehearing was filed September 26, 1942, and denied October 12, 1942 (R. Vol. XII, p. 5598). Jurisdiction to issue the writ rests on Section 240 (a) of the Judicial Code (28 U. S. C. Sec. 347) as amended by the Act of February 13, 1925.

STATEMENT.

The facts and rulings material to the consideration of the questions presented are fully stated in the foregoing petition.

SUMMARY OF ARGUMENT.

The Points of the Argument follow the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT

I.

The decision of the Court of Appeals below erroneously follows the overruled case of *Mitchell* v. *Tilghman*, 19 Wall. 287; and is in conflict with the controlling decision of this Court in *Tilghman* v. *Proctor*, 102 U. S. 707.

In the instant case, the Court of Appeals below has applied the rule and reasoning of the decision in the overruled case of *Mitchell* v. *Tilghman*, 19 Wall. 287, in construing the two pioneer patents here in suit, and this despite the fact that the *Mitchell* case was not cited in the briefs of either party or at the argument. In this respect, the Court of Appeals below concluded that each of the two patents in suit was confined, not to the *process* described and claimed therein, but rather to the particular apparatus and to the particular mode of applying the process which was pointed out in the specification thereof to show that the patented process was capable of being performed in actual experience.

In respect of patent No. 1,819,923 (the resistivity patent) the Court below said that "We cannot doubt that the teaching of this patent is, that with ordinary apparatus in a drill hole readings shall be made of electrical reactions which are to be used in a formula to calculate the specific resistivity of the rocks or earth between the electrodes * * * In the process of appellant * * * no formula is used, nor any effort made to calculate specific resistivities. * * * There is no infringement if the patent is valid. Compare *Mitchell* v. *Tilghman*, 19 Wall. 287."

In respect of Patent No. 1,913,293 (the porosity patent) the Court below concluded that the practice of the process of this patent in an operation which used "the same cable and instruments in making all the desirable curves in one quick operation" was tantamount to the use of a different process merely because additional apparatus than that disclosed in the patent was required to enable one to practice the two methods *simultaneously*.

In the instant case, however, the Court of Appeals below did not rest its decision on the issue of infringement. It held that the process of each of the two patents in suit, as construed by it, lacked the patentable utility required by statute because the commercial operations of the art and industry which these patents in suit had, *per se*, created, comprehended "many *refinements* of method and *improvements* in apparatus" over the "simplicities" of the patent disclosures.* In this connection the Court of Appeals below said that (R. Vol. XII, pp. 5571, 5576):

> "Neither patent practiced by itself would have had any success. The older patent (1,819,923) was a commercial failure till combined with the second (1,913,293) and the combination made little progress until both the processes and instruments were changed to eliminate inaccuracies in ways, some also patented, which greatly enhanced, if they did not wholly produce the commercial success. * * * The commercially successful logs are the result of *improvements* and changes

* In so finding the Circuit Court was in error, but the discussion of its error of law in applying an erroneous rule of construction is presented for purposes of argument in this section of the brief, with an acceptance of its errors of fact. The error of the Court of Appeals below in ignoring the findings of fact by the Trial Court, is treated in the second section of this brief.

> that required much research and experiment and which were themselves in many cases found worthy of patents. * * * We think that what Schlumberger in the disclosures of these patents gave to the public is not such as the statute contemplates * * * We therefore adjudge the contested claims of each patent invalid. * * *"

The decision of this case in *Tilghman* v. *Proctor*, 102 U. S. 707, has stood since 1881 as the applicable law for questions involving the construction of process patents. The rule of that case is that a process patent shall be construed as such, and shall not be limited to the particular apparatus or the particular mode of applying and using the process pointed out in the specification.

The peculiar history of the litigation involving Tilghman's patent No. 11,766 in issue in the *Proctor* case, lends emphasis to the rule.

Tilghman's patent was for a process for obtaining fatty acids and glycerine from fatty bodies by the action of water at high temperature and pressure. It was first before the Supreme Court in *Mitchell* v. *Tilghman* (1874), 19 Wall. 287. In the *Mitchell* case the Court construed the patented process as limited to the particular mode of applying and using the process which the patentee, pursuant to the statutory requirements, had pointed out in the specification. Such construction necessarily read into the patented process non-essential apparatus as well as limitations. So construed, the Court indicated doubt as to the validity of the patent because the disclosed apparatus and the described mode of applying the disclosed process appeared to lack utility for *commercial* practice, but concluded that the patent was not infringed.

Seven years later *the same patent* was again before this Court in the *Proctor* case. In deciding the *Proctor* case, the Court expressly overruled the *Mitchell* case, holding that:

> "* * * the court is unanimously of the opinion, contrary to the decision in the *Mitchell* case, that the patent of Tilghman must be sustained as a patent for a process, and not merely for the particular mode of applying and using the process pointed out in the specification, * * *." (102 U. S. at p. 708).
>
> "In the case of *Mitchell*, the majority of the court was of opinion that in the application of the process thus claimed the patentee was confined to the method of using the process particularly pointed out in the specification; * * *." (102 U. S. at p. 709).
>
> "* * * On further reflection, we are of opinion that, in the case referred to, sufficient consideration was not given to the fact that the patent is for a process, and not for any specific mechanism for carrying such process into effect." (102 U. S. at p. 710).

In respect of the nature of the disclosures required of process patents by the Statute, and the effect of such disclosure upon the construction to be accorded such patent, the Court, in the *Proctor* case, said:

> "* * * There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or

> some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience." (102 U. S. at pp. 728-729).

The law applicable to the construction of process patents, as laid down by this Court in the *Proctor* case, is plain and unequivocal.

No pioneer patent "creating a new art" (*Eibel Process Co.* v. *Minnesota & Ontario Paper Co.* (1923), 261 U. S. 45, 63), as the patents in suit admittedly did, could survive such a test of ultimate commercial perfection of apparatus as the Court of Appeals has employed in the instant case. The test itself is indicative of the extent to which the Court of Appeals below felt justified in departing from the controlling decisions of this Court in order to invalidate the two pioneer patents in suit. It is directly in conflict with the decisions of this Court in *Tilghman* v. *Proctor, supra,* as well as in *The Telephone Cases* (1888), 126 U. S. 1, 536; and *Hildreth* v. *Mastoras* (1921), 257 U. S. 27, 34. In *Tilghman* v. *Proctor,* this Court, in repudiating its earlier decision in the *Mitchell* case, followed by the Court below, held that a patent for a process, irrespective of the described apparatus or the particular mode of applying the disclosed process, satisfies the statute provided it described some apparatus or some mode of applying the process "by which the process can be applied with at least some benefical result".

In *The Telephone Cases, supra,* this Court stated that (at 126 U. S. 536):

> "The law does not require that a discoverer or inventor, in order to get a patent for a process,

> must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. This Bell did. * * *"

In *Hildreth* v. *Mastoras, supra,* the Court said (257 U. S. at p. 34):

> "* * * It is not necessary, in order to sustain a generic patent, to show that the device is a commercial success * * * if it actually and mechanically performs, though only in a crude way, the important functions by which it makes the substantial change claimed for it in the art, it is enough. * * *"

This established rule governing the construction of claims for processes was followed by this Court in *Smith* v. *Snow* (1935), 294 U. S. 1, 11.

No patents ever presented to this or any other Court are more entitled than the patents in suit to be designated "pioneer" or "generic" patents. In these circumstances, it is submitted that this Court should review the decision below and correct the injustice which follows from and is inherent in the obviously bad law applied by the Fifth Circuit Court of Appeals in construing the two patents in suit, and in judging the utility of the *processes* disclosed by such patents in terms of the commercial acceptabilities of the particular *apparatus* disclosed in the patents.

II.

The decision of the Court of Appeals below is in conflict with the proper construction of the Statute (U. S. C. Title 35, Sec. 33) and the applicable decisions of this Court.

The opinion of the Court below is somewhat confusing, but from its disparagement of the exceptional utility of the inventions in suit, its repeated references to alleged later "refinements of methods and improvements in apparatus", and its statement of its own view that one skilled in the art could not practice the inventions in a useful manner from the teaching of the patents, it seems apparent that it has misconstrued the Statute as to the nature of the disclosure required for one skilled in the art; as to the function of the claims, as distinguished from the function of the specification, in labeling what is claimed to be new and useful; and as to the nature of processes or methods as distinguished from the particular modes of applying them and the apparatus employed.

The correct rule of construction of the nature of the disclosure required in process patents is stated in *Tilghman* v. *Proctor* (102 U. S. at pp. 728, 729), where this Court said:

> "* * * There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he

> must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

The same rule was expressly stated in *The Telephone Cases* (126 U. S. at p. 535) and in *Hildreth* v. *Mastoras* (257 U. S. at p. 34; cf. Brief, pp. 26 and 27 *ante*). The construction employed by the Court below in the instant case was in direct violation of this established rule. It determined whether or not the Statute was satisfied by comparing the particular mode of applying the patented processes and the particular apparatus employed commercially, with the particular mode of applying the processes and the particular apparatus disclosed in the patents. Because the two processes are practiced *simultaneously* for convenience, in commercial use, the Court erroneously concluded that the processes as disclosed and claimed were not practiced and hence not useful within the meaning of the Statute. This was clearly error, and clearly contrary to the requirements of the Statute.

The Court below appears to have been further confused in suggesting that the disclosures do not label what is new (as compared to what is old). For example, in connection with the porosity patent, the Court said, R. Vol. XII, p. 5576: "In not a single place is there any clear statement that the applicant for the patent has discovered anything, and what it is." If this statement means (as it appears to) that an applicant is required to label what is new in his specification, it is clearly in conflict with the express

ruling by this Court in *The Corn-Planter Patent* (90 U. S. 181, 222) in which the Court disposed of this very contention by saying:

> "* * * There is nothing in the patent law which, in terms, requires the patentee to do this. * * * But what can be a more explicit declaration of what is new and what is old than the summary of the patentee's claim at the close of the specification * * *."

Both patents in suit distinctly point out in the claims what is claimed to be new and useful. Claim 1 of the porosity patent for example, recites the steps of procedure comprising a complete process, and as to one of these steps is expressly limited to electrical measurements of "differences of potential" in the water at various depths. The language of the specification conforms to the claim, in that it states:

> "The electric current (spontaneously generated by filtration) gives rise by ohmic effect to differences of potential, and the measurement of these differences constitutes the basis of the process herein described.
>
> * * *
>
> The inspection of the diagram therefore makes it possible to locate the various porous layers traversed by the drill hole and to measure their depth and thickness" (Pat. p. 1, l. 59; p. 2, l. 7, R. Vol. VI, p. 3827).

Hence, what is described and what is claimed is clear and unequivocal; both parties follow the practices described and claimed, in their commercial work.

Similarly, in the resistivity patent, claim 1, for example, requires the measurement of the electrical specific resistivity of the formations encountered at

different depths, and such measurements are made in water contained in the drill hole. In the making of such measurements the patent states:

> "The measure of the potential between the electrodes M and N in the water is then equivalent to a measure made inside the earth at distances r and r' from the electrode A" (Pat. p. 2, l. 25, R. Vol. V, p. 3251).

The electrical process as claimed conforms to the teaching of the specification. The process described has been practiced successfully. The disclosure and claim clearly meet the requirements of the Statute.

It is clear that the Court's errors in construing the Statute resulted from its wrong premise in adopting the principle of construction in the overruled case of *Mitchell* v. *Tilghman, supra* (discussed under Point I in this brief). Since this principle of construction in the *Mitchell* case was expressly overruled by this Court in *Tilghman* v. *Proctor, supra*, the premise of the Court below necessarily was false and the application of the Statute to this false premise necessarily resulted in error. In these circumstances it would appear to be clear that an injustice has been done to petitioner.

III.

The decision of the Court of Appeals below is in conflict with the accepted and usual course of judicial procedure as laid down by Rule 53a of the Federal Rules of Civil Procedure and the controlling decisions of this Court in *Davis* v. *Schwartz* (1895), 155 U. S. 631, 636, and *Adamson* v. *Gilliland* (1917), 242 U. S. 350, 353.

The Court of Appeals below, in several instances, reversed findings of fact which were made by the District Court. Many erroneous statements by the Court of Appeals involve conclusions in which it has substituted its own opinion for the testimony accepted by the District Court and on which it based its findings. Many of these statements involve conclusions as to technical facts on which the Court of Appeals could not have been qualified and as to which the District Court had to make findings in the light of the conflicting testimony and credibility of expert witnesses.

In arriving at such findings the Court of Appeals below rendered a decision in direct conflict with the accepted and usual course of judicial procedure as laid down by Rule 53a of the Federal Rules of Civil Procedure and by the decisions of this Court in *Davis* v. *Schwartz* (1895), 155 U. S. 631, 636, and *Adamson* v. *Gilliland* (1917), 242 U. S. 350, 353.

The following erroneous statements of fact were made by the Court of Appeals in conflict with the findings of the District Court:

> "Neither patent practiced by itself would have had any success" (R. Vol. XII, p. 5571).

"The older patent was a commercial failure till combined with the second, and the combination made little progress until both the processes and instruments were changed to eliminate inaccuracies in ways * * * which greatly enhanced if they did not wholly produce the commercial success (R. Vol. XII, p. 5571).

"The necessary substitution of alternating current for the direct current which was shown in the first patent, and the special apparatus necessary to use the same cable and instruments in the making of all the desirable curves in one quick operation, and to eliminate disturbing intrusions, were things that were slow in coming, and the results of independent research and experiment" (R. Vol. XII, p. 5576).

"As to both these patents we are further of opinion that no sufficient disclosure of methods is made to enable any one to make useful electrical logs solely by their teaching and the knowledge of one skilled in electricity and well drilling" (R. Vol. XII, p. 5576).

"The appellee and its predecessor began in 1929 an effort to make these electrical investigations about 'resistivity', but without any commercial success, at least in the United States" (R. Vol. XII, p. 5570).

"* * * the definite calcualtion of specific resistivity * * * is not useful, and is not used" (R. Vol. XII, p. 5574, referring to the resistivity patent No. 1,819,923).

The District Court, after a trial lasting thirty court days, filed its findings of fact and conclusions of law, in accordance with the provisions of Rule 52 of the Rules of Civil Procedure. Its findings embraced the

technical points set forth above from the opinion of the Court of Appeals and were contrary to the statements made by that Court.

As to the operativeness of the method disclosed in resistivity patent No. 1,819,923, the District Court held that:

> "The mechanism described in Plaintiff's Patent No. 1,819,923 and the Drawings accompanying and which are a part of same, when used in the manner designated in the Patent * * * and used in connection with some character of indicator (such as P in such Patent and Drawings) will register on such indicator as such mechanism is used in and descends or ascends in such drill hole. When such mechanism is so used in connection with a chart making or recording mechanism there are produced charts, records, etc. (called logs) * * * If the mechanism described in the Patent be not used in connection with a chart or record making register, it may be used with some simpler character of register, and action of the register recorded by hand" (R. Vol. I, p. 156).

As to the operativeness of the method disclosed in the porosity patent No. 1,913,293, the District Court found:

> "The mechanism described in Plaintiff's Patent No. 1,913,293, when used in the manner and under the conditions mentioned in the Patent and in connection with a chartmaking or recording mechanism, also produces charts or records (called logs) * * *" (R. Vol. I, p. 156).

As to the said logs thus produced by the mechanisms described in the two patents when used in the manner designated in said patents, the District Court found:

> "These logs * * * enable a conclusion to be reached as to the geological formation in such

area. The conclusion is usually found correct and accurate, and the oil industry has found such logs very dependable and valuable. (c) The process, mechanism etc. described in and covered by Patent No. 1,819,923 were * * * useful * * * The process, mechanism etc. described in and covered by Patent No. 1,913,293 were * * * useful * * *" (R. Vol. I, p. 157).

As to the unwarranted assertion by the Court of Appeals that there was any lack of successful operation or of successful exploitation, because of delay which it erroneously ascribed to later refinements of method and apparatus, the District Court found:

"(d) The evidence shows that while due to economic conditons throughout the country [commencing in 1930] which affected the oil industry, the Patents in suit were not immediately profitable, that later they became very profitable, and Plaintiff began doing, and has since been doing, a very large and profitable commercial business in the manufacture, use, renting etc. of the processes and mechanism etc. covered thereby. Defendant contends that Plaintiff is not using, and has not been using the processes, mechanism etc. covered by its Patents. This contention is not correct. The evidence shows that Plaintiff has been and is now using the processes, mechanisms described in its Patents" (R. Vol. I, p. 158).

The utility and commercial suitability of the methods in suit are further established by the finding of the District Court as to the use of such methods by the Respondent. The District Court found:

"(e) I have had little or no difficulty on the question of whether defendant has infringed

> plaintiff's patents. I think the evidence supports and compels a finding, and I find, that the processes, mechanism, etc. which defendant is manufacturing, using, renting, etc. are substantially identical with those covered by plaintiff's patents, and infringes those claims which plaintiff has involved in this suit" (R. Vol. I, p. 158).

The foregoing Findings of Fact by the District Court Judge depended upon the conflicting testimony and credibility of witnesses heard by him, except as to the successful use of the resistivity method alone in the United States, and the temporary suspension of commercial activities due to "economic conditions". These latter findings were based on evidence offered by petitioner; no contrary evidence was offered by the Respondent. Accordingly, the Court of Appeals had no evidence before it to support its statement that the resistivity method was not practiced with commercial success in the United States in 1929, and that the commercial success of the patented methods awaited, and was dependent upon, later refinements of method and apparatus.

Nor was there any evidence before the Court of Appeals to support its gratuitous statement that "Neither patent practiced by itself would have had any success." The only evidence bearing on this point shows that the resistivity method was practiced successfully by itself. The undisputed evidence of record shows that, in the surveys conducted by the petitioner's predecessor in Oklahoma in 1929, the method described in the resistivity patent, with all its "simplicities", was followed *literally* and successfully in obtaining over thirty logs (R. Vol. III, pp. 2243-2252). This precise method, at that time, was also in commercial use in France and Venezuela

(R. Vol. III, p. 2251). In view of the reduction in drilling incident to the depression in 1930, and the fact that the resistivity method was being profitably exploited at that time in Venezuela, the equipment was sent from the United States to that country in July, 1930 (R. Vol. III, p. 2260).

This evidence conclusively establishes the error of the Court of Appeals in holding that the resistivity patent No. 1,819,923 does not teach one skilled in the art to make successful logs; that neither patent practiced by itself would have had success; and that the resistivity method depended for success upon later refinements or any refinements of methods and apparatus, or its combination with the porosity method.

The evidence establishes, and the District Court found, that the porosity method is used by both parties. There is no difference between what the respondent does commercially and what is described in the patent (R. Vol. III, pp. 2370, 2371). There is no dispute as to the purpose for which respondent's porosity curve is run; it is the same purpose as that described in the patent in suit, namely, to reveal "fluid permeability of the formations" (R. Vol. VI, p. 3883). The respondent has not denied, and the testimony shows, that the porosity method is not modified or affected by the fact that the resistivity method is carried on simultaneously (R. Vol. 1, pp. 327, 328). The opinion of the Court of Appeals, in which it disparaged the utility of the two patented methods, considered separately, confined its tribute to the practice of the methods *simultaneously*. This treatment was wholly unjustified and unfair. In practice, both methods retain their complete and separate identities, as disclosed in the respective patents in suit, even though they are carried on simultaneously. The opinion of the Court of Appeals shows clearly that it mis-

takenly believed that the utility of the two patented methods which created the art of electrical logging should be ignored, merely because they are practiced *simultaneously* rather than separately.

The statement by the Court of Appeals that the calculation of specific resistivity as disclosed in patent No. 1,819,923 is not made and "is not useful and is not used" is likewise contrary to the evidence which supports the findings of the District Court. The evidence of record is that samples of earth were taken from a well and their resistivities measured by approved laboratory technique; and that the ascertained specific resistivity values of these samples were substantially identical with the specific resistivity values shown on the curve of petitioner's commercial log taken in that well at the same depths from which said samples were taken (R. Vol. IV, pp. 2470-2474). The defendant's commercial log taken in the same well on the same day showed substantially the same resistivity values at such depths (R. Vol. IV, p. 2481). *This testimony was in no way refuted or contradicted by respondent.* Such testimony establishes that the value of the specific resistivity of formations traversed is shown on electrical logs and that the method described in the resistivity patent is practiced in this respect.

The Court was also mistaken in saying that strata which are unhomogeneous do not have an ascertainable specific resistivity. All strata, whether roughly homogeneous or not, have a measurable specific resistivity *in situ*.

It is immaterial whether the particular formation under investigation is truly homogeneous as the patent recognizes that it may be only "roughly homogeneous" (R. Vol. V, p. 3250; pat. p. 1, l. 98). Actu-

ally, most of the sediments of the Lower Gulf Coast region are "homogeneous sediments, unconsolidated" (R. Vol. I, p. 193). Accordingly, specific resistivity can be and is "affirmed of them", contrary to the statement of the Court of Appeals.

The resistivity patent clearly instructs one to make a log on which is shown the resistivities of the formations and, necessarily, the "variations" of such resistivities. The patent states that the "measurements taken along a drill hole are given in the form of a diagram of the resistivities of the rocks at different depths" and that "this 'electrical log' shows the depth of the geological horizons such as the top of any given formation" (Pat. Spec. p. 1, l. 32, R. Vol. V, p. 3250). Such a diagram shows the "variations" and from these "variations" one may locate the depth of the top and bottom boundaries of formations traversed. The Court below held, in effect, that such a process is not that "disclosed in the patent", despite the explicit descriptive matter quoted from the specification.

As to the prior art, alleged to bear on the resistivity method, the Court of Appeals referred generally to it, and to earlier patents of Schlumberger.* These patents relate merely to proposed electrical "prospecting" methods (of no commercial value) carried on along the surface of the earth or in mine shafts (not filled with water) to locate buried metallic deposits. By moving separate electrical contact members about freely and varying their spacings, it was hoped that a buried metallic mass would constitute such an anomaly as to give indications of its presence. No unitary electrical device was provided nor were local measurements obtained

* These patents are found in the Record at Vol. VII, p. 4187, and Vol. VIII, p. 4604.

in a bore hole filled with water, of the specific resistivity of strata *in situ* traversed by a bore hole. No "electric log" showing the top and bottom of strata traversed, nor from which could be deduced the nature of such strata, was obtained or obtainable or sought to be obtained, by any method disclosed or suggested in the prior art. While the Court of Appeals referred to the prior art, it did not discuss its application to the resistivity method claimed in the patent in suit and did not rest its decision on lack of novelty.

As to the porosity patent No. 1,913,293, the Court of Appeals said that "the claim (1) is too broad", without, however, asserting that the limitations of the claim or the steps comprising the method, are found in the prior art. The patentee expressly stated in his specification that the spontaneous current generated by filtration "gives rise by ohmic effect to differences of potential, and the measurement of these differences constitutes the basis of the process herein described" (R. Vol. VI, p. 3827; pat. p. 1, l. 59). The claim expressly requires the measurment in the water of such spontaneous "differences of potential". As to the utilization of the phenomenon of electrofiltration and the discovery of electrical conditions created by it, and the mode of operation to which he limited himself, the patentee stated: "Such a filtration gives rise to an electric current which may be observed by measuring the differences of potential it creates in the water contained in the drill hole, exactly at the level of the porous stratum" (R. Vol. VI, p. 3827; pat. p. 1, l. 78). After describing the making of a diagram (log) showing such measured "differences of potential", the patentee pointed out: "The inspection of the diagram therefore makes it

possible to locate the various porous layers traversed by the drill hole and to measure their depth and thickness" (pat. p. 2, l. 7). Contrary to the statement of the Court of Appeals, the claim is limited to the utilization of the spontaneously generated current by *electrical* measurements in the water, and *electrical* measurements of a specific character, namely, "differences of potential", in the water opposite the sands. Others are free, so far as the claim goes, to utilize for the same purpose such electro-filtration phenomenon in bore holes, by the making of other measurements than those claimed, such as electro-magnetic or radio wave measurements—anything except "differences of potential".

There is no prior art suggesting any electrical process of any nature whatsoever for identifying porous formations in the earth. It necessarily follows, and is the fact, that no electrical process carried on in a drill hole filled with water and in which "differences of potential" generated spontaneously by filtration are measured, is suggested in the prior art. In so far as the claim distinctly differentiates from the prior art, it cannot properly be said out-of-hand that it is "too broad". The Court of Appeals did not hold that it reads on the prior art, but nevertheless unwarrantably said that "the claim is too broad".

Conclusion.

The opinion below is confused, in that it makes a number of carping criticisms of these patents and then rests its conclusions on other grounds. The opinion seems to involve the idea that a number of unsound points add up to a good one. The statement that the patents do not disclose enough to enable one

skilled in the art to apply the inventions suggests that what would be obvious to one skilled in the art is always obvious to a Court. Despite these confusions, it is clear that the Court below applied erroneous (and overruled) principles of patent law of general application and importance to this case and in that respect certiorari is justified under Rule 38 (5b) of this Court. That error was fundamental and was the premise on which later erroneous conclusions of the Court below were based.

The disregard of the Trial Court's findings in the face of ample evidence to support them is a plain disregard of the decisions of this Court.

These are pioneer patents creating an important new art and the petitioner ought not now be denied a review, because a conflict between circuits has not arisen under war conditions which prevent such a conflict arising.

Respectfully submitted,

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Of Counsel.

December, 1942.

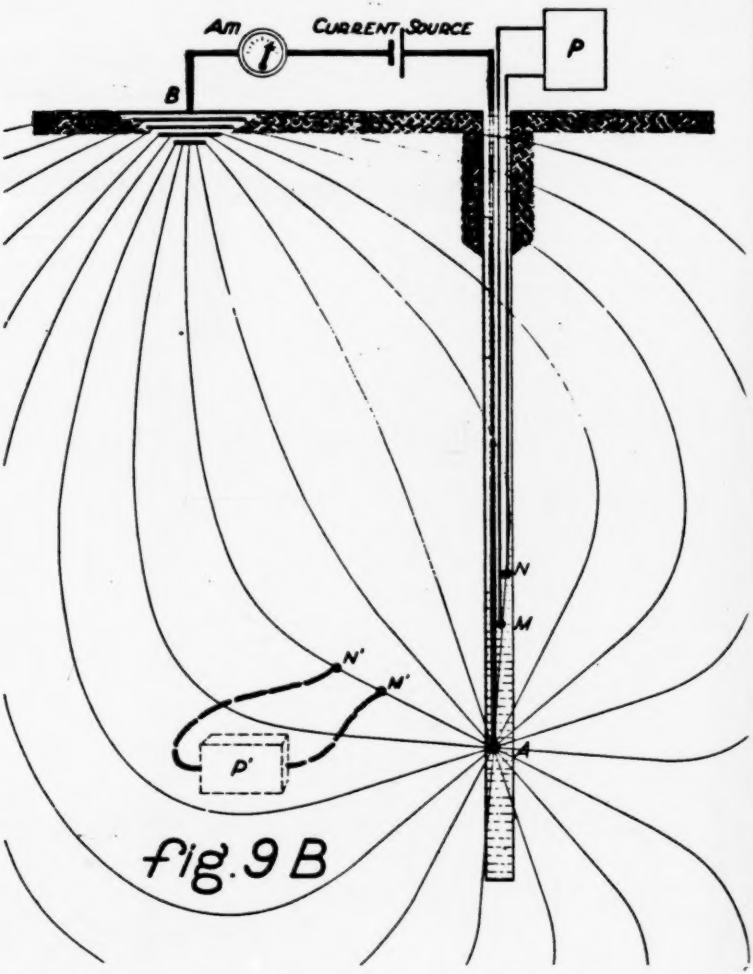


fig. 9 B

Exhibit 47.

(PHOTOPRINT.)

Exhibit 32.

(PHOTOPRINT.)

[*For the Convenience of Court and Counsel this Exhibit (Photostatic Copy) is Bound in on the Opposite Page.*]

fig. 13A

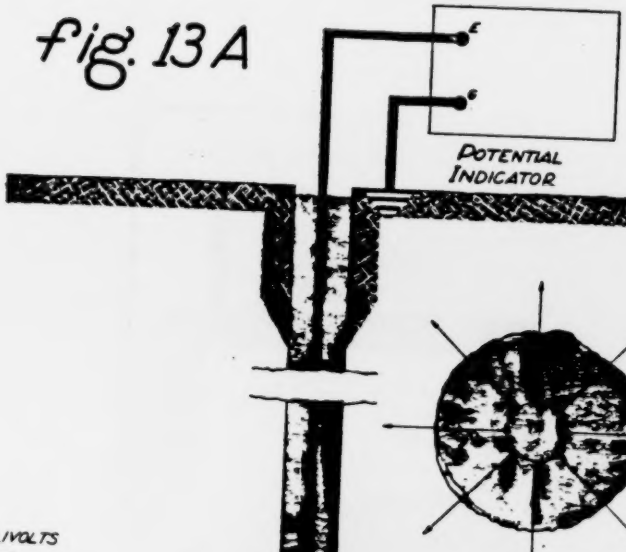
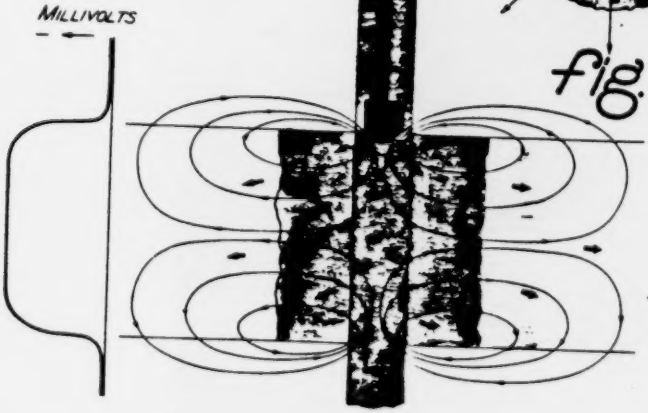


fig. 13B



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 612

SCHLUMBERGER WELL SURVEYING CORPORATION,

Petitioner,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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SUBJECT INDEX.

	PAGE
Introduction	1
Question 1.—The alleged failure of the Courts of Appeals to follow applicable decisions of this Court	4
Question 2.—The alleged misconception by the Court of Appeals of the requirements of the patent statute, and failure to apply applicable decisions of this Court in holding that neither patent points out in the disclosure, or distinctly claims, a useful invention	6
Question 3.—The alleged disregard by the Courts of Appeals of Rule 53a of the Federal Rules of Civil Procedure	8
Conclusion	8

TABLE OF CASES AND AUTHORITIES CITED.

CASES. **PAGE**

Adamson v. Gilliland, 242 US 350, 353 8

Altoona Publix Theatres, Inc. v. Tri-Ergon Corp., 294 US 477 3

Carnegie Steel Co. v. Cambria Iron Co., 185 US 403, 432 ..... 4, 6

Continental Paper Bag Co. v. Eastern P. B. Co., 210 US 405, 419 ..... 4, 6

Davis v. Schwartz, 155 US 631, 636 8

Detrola Radio & Television Corp. v. Hazeltine Corp., 313 US 259 8

Exhibit Supply Co. v. Ace Corp. (decided by this Court Feb. 2, 1942 – 86 L ed Adv. Ops. 453) 8

General Electric Co. v. Wabash Appliance Corp., 304 US 364, 369, 372, 373 ..... 4, 6, 8

Hobbs v. Beach, 180 US 383, 400 6

Holland Furniture Co. v. Perkins Glue Co., 277 US 245, 257 6

Honolulu Oil Corp. v. Halliburton, 306 US 350 8

Layne & Bowler Corp. v. Western Well Works, 261 US 388 2

Mitchell v. Tilghman, 19 Wall. 287 ..... 4, 6

Schriber-Schroth Co. v. Cleveland Trust Co., 305 US 47 ..... 4, 6

Schriber-Schroth Co. v. Cleveland Trust Co., 311 US 211, 217 ..... 4, 6, 8

Standard Brands v. National Grain Yeast Corp., 308 US 34 8

Textile Mach. Works v. L. Hirsch Textile Machines, Inc., 302 US 490 8

Tilghman v. Proctor, 102 US 707 ..... 4, 6

United Carbon Co. v. Binney & Smith Co., decided by this Court Dec. 7, 1942 (not officially reported; see 87 L ed Adv. Ops. 158) 5

RULE.

Rule 53a of the Federal Rules of Civil Procedure 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

SCHLUMBERGER WELL SURVEYING CORPORATION,

Petitioner,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

This is the ordinary patent infringement suit, brought by the petitioner in the United States District Court for the Southern District of Texas, charging respondent with infringement of the four claims of Letters Patent No. 1,819,923 [V. 3249-51]* and claim 1 of Letters Patent No. 1,913,293 [VI. 3826-9]. The Court of Appeals for the Fifth Circuit adjudged all of the claims of patent 1,819,923, and claim 1 of patent 1,913,293, invalid and

*Herein the Roman numeral indicates the Volume of the Record, followed by the page number.

adjudged non-infringement of the claims of patent 1,819,923 [XII. 5568-76; 130 F 2d 589]. There is no pretense of a conflict of decision with regard to either of these patents. This is the only decision adjudicating either of said patents. The controversy is of a private nature, between competitors in the same business. No question of public importance is involved.

In *Layne & Bowler Corp. v. Western Well Works,* 261 US 388, this Court held that a writ of certiorari will not be granted in patent litigation except in cases involving principles, the settlement of which is important to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. No such situation exists here.

The petition (p. 20) represents that the inventions in controversy are of "great social and economic benefit to the public and to the petroleum industry, * * *"; that at present "Respondent is the only infringer * * *"; that "Further litigation with a resulting conflict of decision is improbable * * * at least for the duration of the war." (p. 16). The use of the processes and apparatus in controversy is manifestly not limited to the Fifth Circuit. The petroleum industry is not localized therein. A substantial percentage of all corporations engaged in the oil business are organized under the laws of Delaware and may be sued in the District of Delaware. This Court takes judicial notice of the commonly known fact that there has been and continues to be extensive development

of oil fields in the Third, Fifth, Sixth, Seventh, Ninth and Tenth Circuits. The drilling for oil in Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wyoming, Kansas, Oklahoma, Texas and California is common knowledge. The very fact that the claims in issue of the respective patents have been held invalid insures the use by the public of such alleged inventions, if they have value. The mere fact that ordinary civil business endeavor is curtailed by the war effort is not a cogent or any ground for the grant of the writ of certiorari in this case. It is believed that this Court will take judicial notice of the fact that the federal government is now urging the discovery and development of new oil fields throughout the United States. No such showing is made by petitioner here, as was made in the case of *Altoona Publix Theatres, Inc. v. Tri-Ergon Corp.*, 294 US 477, wherein the therein petitioner proved that the patent owner had publicly announced it would not bring any suit in any other circuit. Indeed, petitioner had already brought suit in the Southern District of California on one of the patents in question before filing the instant suit. [III. 2325.]

The petitioner herein (pp. 2-3) presents three alleged questions, the determination of which by this Court is requested upon certiorari. These questions exist only in the imagination of petitioner's counsel, and do not exist in the case.

Question 1.—The alleged failure of the Court of Appeals to follow applicable decisions of this Court.

Petitioner predicates this question upon an alleged application of the *decision* in *Mitchell v. Tilghman,* 19 Wall. 287, and a disregard or overlooking of the later decision of this Court in *Tilghman v. Proctor,* 102 US 707, which expressly overruled *Mitchell v. Tilghman.* This first question is based upon a fallacious reading of the opinion of the Court of Appeals herein. The applicable decisions of this Court, relied upon by the Court of Appeals herein, are stated in the opinion. The interpretation of the claims of the respective patents in suit was based upon the authority of, and followed the decisions of this Court in, *Carnegie Steel Co. v. Cambria Iron Co.,* 185 US 403, 432; *Continental Paper Bag Co. v. Eastern P. B. Co.,* 210 US 405, 419; *Schriber-Schroth Co. v. Cleveland Trust Co.,* 311 US 211, 217; *Schriber-Schroth Co. v. Cleveland Trust Co.,* 305 US 47,—and not upon either *Mitchell v. Tilghman* or *Tilghman v. Proctor.*

The opinion of the Court of Appeals herein applied the well-established principle that the claim or claims of a patent measure the invention and determine what is patented; that the claims may be explained and illustrated by the description, but they cannot be enlarged by it (*Continental Paper Bag Co. v. Eastern P. B. Co.,* 210 US 405, 419); and that, as said by this Court in *General Electric Co. v. Wabash Appliance Corp.,* 304 US 364, 372:—

> "But Congress requires, for the protection of the public, that the inventor set out a definite limitation

of his patent; that condition must be satisfied before the monopoly is granted. * * *"

"* * * Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirement as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must 'inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.' The claims 'measure the invention.' * * *" (*Id.* at p. 369.)

Cf. *United Carbon Co. v. Binney & Smith Co.*, decided by this Court Dec. 7, 1942 (not officially reported; see 87 L ed Adv. Ops. 158).

The decision of the Court of Appeals is not in conflict with the well-established principles of patent law respecting the interpretation of patents for inventions. The case presents no conflict of decision and no principle, or the application of any principle, not thoroughly established and clarified by the decisions of this Court.

Question 2.—The alleged misconception by the Court of Appeals of the requirements of the patent statute, and failure to apply applicable decisions of this Court in holding that neither patent points out in the disclosure, or distinctly claims, a useful invention.

With respect to the resistivity patent, 1,819,923, the Court of Appeals analyzed the disclosure of the specification and interpreted the claims in the light of the specification, applying the well-established principle that, "The claim of a patent must always be explained by and read in connection with the specification, * * *" (*Carnegie Steel Co. v. Cambria Iron Co.,* 185 US 403, 432; Cf. *Continental Paper Bag Co. v. Eastern P. B. Co.,* 210 US 405, 419; *Schriber-Schroth Co. v. Cleveland Trust Co.,* 311 US 211, 217-18). See particularly opinion of Court of Appeals [XII. 5571-4]. The Court of Appeals found:– "The only discovery this patentee distinctly points out that he made is that rocks have specific resistivities which characterize them and can be calculated. His patent monopoly can include no more. *Schriber-Schroth Co. v. Cleveland Trust Co.,* 305 U. S. 547." [XII. 5573]. The principle thus applied and so reiterated in said *Schriber-Schroth* decision is not contrary to either the decision in *Mitchell v. Tilghman,* 19 Wall. 287, or *Tilghman v. Proctor,* 102 US 707. This Court has recognized that the principles of law set forth in said *Mitchell v. Tilghman* decision were not determined to be erroneous in *Tilghman v. Proctor.* On the contrary, this Court has several times cited the decision in *Mitchell v. Tilghman* as authority. Cf. *Holland Furniture Co. v. Perkins Glue Co.,* 277 US 245, 257; *General Elec. Co. v. Wabash Appliance Corp.,* 304 US 364, 373; *Hobbs v. Beach,* 180 US 383, 400.

The Court of Appeals followed established authority in first determining what was disclosed in and defined by the claims of the patents in suit, giving due effect to the disclosures of the specifications of the respective patents. It found that neither of the patents defined the patented invention as the making of an electrical log. The statements of **"Facts."** (pp. 5-14 of the petition herein) are in direct opposition to the facts found in the opinion of the Court of Appeals. The District Court herein rendered no opinion discussing or interpreting either of the patents and made no substantial findings of fact [I. 153-9, 163-5]. The Court of Appeals analyzed the disclosures of the respective patents, to determine therefrom the interpretation, meaning and scope of the claims in suit. Such determination rendered it necessary for the Court to make the specific findings reflected in its opinion. The case does not present a situation wherein any finding of fact of the District Court is reversed by the Court of Appeals. The paucity of the District Court's statement of the case [I. 153-5]—even as amended [I. 160-61]—reflects the entire failure of the District Court to consider what is *claimed* as the invention in the respective claims of the patents. The conclusions expressed in the District Court's so-called "Findings of Fact" indicate the misapprehension of the District Court as to what is patented in the respective patents. Neither of the patents claims as the invention the making of an electrical log. The District Court's statement of the case and its findings refer to such logs in such manner as to indicate that the making of such log or logs, and the comparison of such a log of one well with logs of other wells, is the patented invention [*Cf.* Pars. (a) and (b) – I. 156-7].

Question 3.—The alleged disregard by the Court of Appeals of Rule 53a of the Federal Rules of Civil Procedure.

The case presents no "conflict with the accepted and usual course of judicial procedure, as laid down by Rule 53a of the Federal Rules of Civil Procedure and by the decisions of this Court in *Davis v. Schwartz* (1895), 155 U.S. 631, 636; and *Adamson v. Gilliland,* 242 U.S. 350, 353." (Petition, pp. 19-20). The District Court failed to interpret and construe the claims of the patents in suit in accord with the principles of the applicable decisions of this Court. A correct interpretation of such claims and patents, consistent with the applicable decisions of this Court, required the additional findings of the Court of Appeals. To these additional findings of fact, so made by the Court of Appeals, the Court of Appeals applied the principles of patent law established by the applicable decisions of this Court. In so doing, the Court of Appeals followed the precedents established by the decisions of this Court. exemplified in *Honolulu Oil Corp. v. Halliburton,* 306 US 350; *Detrola Radio & Television Corp. v. Hazeltine Corp.,* 313 US 259; *Schriber-Schroth Co. v. Cleveland Trust Co.,* 311 US 211; *Standard Brands v. National Grain Yeast Corp.,* 308 US 34; *Textile Mach. Works v. L. Hirsch Textile Machines, Inc.,* 302 US 490; *General Elec. Co. v. Wabash Appliance Corp.,* 304 US 364; *Exhibit Supply Co. v. Ace Corp.* (decided by this Court Feb. 2, 1942 – 86 L ed Adv. Ops. 453).

The case presents no novel or disputed question of law and no conflict between the principles of law applied by the Court of Appeals and the decisions of this Court. The petition is not based upon any conflict of decision, but merely upon a contention of petitioner that the Court of Appeals erred in its application of established principles of

patent law to the instant facts of the case. Such a contention could be made in any patent case, and cannot be a ground for the grant of a writ of certiorari under the established rules of this Court. We need not therefore extend this brief to show that the Court of Appeal's decision in this case was correct, for this Court is not here concerned with a consideration of the claims in issue of the patents, or of the prior public knowledge referred to by the Court of Appeals in support of its opinion.

We submit there is nothing in this case which justifies the issuance of the writ.

Respectfully submitted,

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Attorneys for Respondent.

JAN 21 1943

IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 612.

SCHLUMBERGER WELL SURVEYING CORPORATION,

Petitioner,

—against—

HALLIBURTON OIL WELL CEMENTING COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

WILLIAM D. MITCHELL,
WORTHINGTON CAMPBELL,
Counsel for Petitioner.

BRADY COLE,
Of Counsel.

THE COURT PRESS, N. Y. C.

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SCHLUMBERGER WELL SURVEYING CORPORATION,
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—against—

HALLIBURTON OIL WELL CEMENTING COMPANY,
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REPLY BRIEF FOR PETITIONER.

In its brief (p. 4), Respondent makes the following statement:

> "Petitioner predicates this (first) question upon an alleged application of the *decision* in *Mitchell* v. *Tilghman*, 19 Wall. 287, etc. * * * The applicable decisions of this Court, relied upon by the Court of Appeals herein, are stated in the opinion. The interpretation of the claims of the respective patents in suit was based upon the authority of, and followed the decisions of this Court in, *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 432; *Continental Paper Bag Co.* v. *Eastern P. B. Co.*, 210 U. S. 405, 419; *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211, 217; *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47 * * *."

This statement is erroneous in the assertion of what appears in the opinion of the Court of Appeals. With

the exception of the so-called first *Schriber-Schroth* case, 305 U. S. 47, which does not seem to be in point for any purpose and which was not even cited by counsel below, none of the cases listed by Respondent as the "applicable decisions" that were "relied upon by the Court of Appeals" and "stated in the opinion" were cited or mentioned at any point in the opinion of the Court of Appeals, which quite apparently relied instead on the doctrine of *Mitchell* v. *Tilghman* (1874), 19 Wall. 287, which was subsequently repudiated in *Tilghman* v. *Proctor* (1881), 102 U. S. 707, as set forth in our petition.

In its brief (p. 3), Respondent seems to suggest that any oil company operating in the various producing areas of the United States may go into the business of making electrical well logs. So far as this record shows and so far as we know, no oil company has essayed to make electrical logs commercially or will ever attempt to do so. This is a new and difficult art that has been left, and doubtless will continue to be left, to service companies. At the present time, there are no service companies prepared and able to do this work with the exception of Respondent and Petitioner and Lane-Wells Company, which is Petitioner's licensee.

The case in the Southern District of California to which Respondent has referred (p. 3) as involving one of the patents in suit was a case against the corporate predecessor of Lane-Wells Company, which obtained a license long ago and which is now operating as a licensed service company throughout the United States. This case was settled and dismissed in 1938 (R., Vol. X, p. 5399). Far from supporting Respondent, these facts reinforce the conclusion that

there are no prospects for the establishment of a conflict between Circuits through the trial of another case at any reasonable time in the future.

We submit that the Writ should be granted.

Respectfully submitted,

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WORTHINGTON CAMPBELL,
Counsel for Petitioner.

BRADY COLE,
Of Counsel.

Due and timely service of three (3) copies of the within BRIEF is hereby admitted this day of 194 .

Attorney for